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October 20, 1983

Ms. Jacklyn Teague, Education Consultant  
Special Education Section  
105 Loudon Road  
Concord, New Hampshire 03301

Dear Ms. Teague:

You have requested advice from this department regarding the interpretation of the phrase "in the legal custody of a parent" in RSA 193:27, IV. The issue raised by your inquiry is whether a child who is in the custody of Welfare, but whose parental rights have not been terminated, is in the legal custody of a parent. We conclude that, absent termination of parental rights, a child remains in the "legal custody of a parent" within the meaning of RSA 193:27, IV.

RSA 193:27, IV defines a sending district as "the school district in which a child last resided before placement in a home for children, health care facility, or state institution." Under this definition, the sending district, and therefore the district liable for special education costs, is defined as the district where the parent resides if the parent has legal custody of the child and lives in New Hampshire.

The term "legal custody" is not defined by either Chapter 193 or Chapter 186-C. In In Re John M., 425 A.2d 887 (N.H. 1982), the New Hampshire Supreme Court analyzed the meaning of the term "residence" for the purpose of determining liability pursuant to RSA 169-B:40, I (Supp. 1982). In determining that the location of the mother's residence should bear school expenses the court found that the child's residence remained with his mother despite temporary custody of him by the Division of Welfare. The Court stated:



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"Because custody of Ronald R. might have been returned to his mother, he is deemed to have resided with her at all times for the purpose of determining liability under RSA 169-B:40."

Although the language of RSA 193:27,IV does not parallel RSA 169-B:40, the term "legal custody" can be construed similarly to the term "residence." Under this construction, the legal custody of the parent would continue until termination of parental rights pursuant to a court decree. This interpretation of the term "legal custody" provides for some measure of stability with regard to the payment of these expenses. Because of the variation in wording among court decrees and the different levels of custodial involvement in the special education process, defining the term "legal custody" as requiring full legal involvement and a termination of the parent's legal status with respect to the child, will provide an administratively simple method of ascertaining school district liability.

Very truly yours,



Leslie J. Ludtke  
Assistant Attorney General  
Division of Legal Counsel

LJL/smg  
83-131-I